NO. 2417

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

In the Matter of the Application of JOHN DENNETT, JR., et al., for Writ of Mandamus Directed to the HON. WILLIAM H. SAWTELLE, District Judge of the United States District Court for the District of Arizona, and Directed to said DISTRICT COURT.

Demurrer to Respondent's Return and Petitioners' Reply Brief

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United States Circuit Court of Appeals for the Ninth Circuit

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DEMURRER.

Comes now John Dennett, Jr., and each and all of the petitioners herein and respectfully demurs to the return of the respondent filed herein, upon the ground that the said return fails to state facts sufficient to constitute a return to the order to show cause heretofore and on or about May 21st issued herein and directed to the respondent requiring said respondent to show cause, if any there be, why a mandamus should not issue to induce said respondent to expunge from the records of the court below a certain decree entered therein in the case of Clark against the Arizona Mutual Savings and Loan Association and the Arizona Trust Company, on March 12, 1914.

And petitioners demur to said return upon the ground that it affirmatively appears from the face thereof that the petitioners are and each of them is entitled to the relief prayed for herein.

WHEREFORE, your petitioners and each of them respectfully pray that a peremptory writ of mandamus issue out of this court as prayed for in the petition heretofore filed herein.

WILLIAM M. SEABURY,
Solicitor for Petitioners,
Fleming Building, Phoenix, Arizona.

United States Circuit Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

This proceeding is now at issue before this Court upon the petition and the exhibits attached thereto for an order which issued out of this court on May 21, 1914, requiring the court below and the Honorable Judge thereof to show cause why a mandamus should not issue to require the court below and the Honorable Judge thereof to expunge from the records of the court a certain alleged decree entered in the case of Clark against the Arizona Mutual Savings and Loan Association and the Arizona Trust Company on March 12, 1914, and upon the return of the respondent to the order to show cause, which return was filed herein on or about September 21, 1914, and also upon the demurrer of the petitioners which has been duly interposed to said

return, which demurrer is based upon the ground that said return is insufficient to constitute any cause why the relief prayed for in the petition should not be granted.

The issue presented for determination by this learned court is, therefore, one purely of law and not of fact. It presents for review the single question whether the court below had jurisdiction to nullify the decree of February 27, 1913, after the expiration of the term at which that decree was entered in the court below.

The argument advanced by the learned respondent in the second opinion, which after the institution of mandamus proceedings was written for the purpose of lending additional support to the decree of March 12, 1914, and by the brief of the learned counsel for the respondent, is an endeavor to induce this court to review the merits of the decree of February 27, 1913, as though that decree were before this court now upon an appeal duly taken therefrom both by the respondent and by the litigants affected thereby.

The difference between the functions which may lawfully be performed by a mandamus directed to the court below, and which are performed in this court, upon the review of a final decree in equity upon an appeal are too well known to require discussion before this learned court. We desire only to point out that the learned respondent seeks to convert this proceeding by mandamus

into a proceeding to review the merits of the decree of February 27th, 1913, as upon an appeal.

No Appellate Court ever permits a petitioner to use the extraordinary writ of mandamus as a means of reviewing ordinary alleged error committed by the court below, and we are confident that this court will not permit the respondent to convert this proceeding into an appeal from the decree of February 27, 1913, especially when it is recalled that the time in which to prosecute an appeal from the decree of February 27, 1913, has long since expired and the only parties affected thereby were entirely satisfied with the merits of that decree and never prosecuted an appeal therefrom or took any steps for the purpose of reviewing it before this or any other appellate tribunal.

Before approaching a discussion of the second opinion of the learned respondent, written in support of the decree of March 12, 1914, and before responding to the brief of our learned opponents, we desire to call attention briefly to two matters which we regard of consequence in the consideration of this subject.

We respectfully direct the court's attention to the persistent refusal on the part of the learned respondent and of his counsel to recognize the fact that all of the stockholders of the Loan Association were in reality protected on a basis of complete equality by the decree of February 27, 1913.

There are repeated and constant references to the rights of "other" stockholders than those named in the final decree of February 27, 1913, when in reality, as the record shows, there were no other stockholders of the association than those specified in the decree of February 27, 1913.

Indeed, in an effort to support the validity of the decree of March 12, 1914, it is said that the record shows that those given a lien by the decree of February 27, 1913,

> "are not the only persons who are stockholders of the Loan Association and, therefore, entitled to share in its assets."

But the contrary is the fact.

The record does show epxressly and by clear and unequivocal intendment that the decree did provide for every stockholder of the Loan Association. Thus paragraph 7 of the decree (Record page 94) is as follows:

> "And to the end that the rights of *all* of the intervenors and of the outstanding stockholders in the defendant Loan Association, who never exchanged their stock therein for stock in the Trust Company, may be adequately preserved and protected, * * etc."

This, of course, means all of the outstanding stockholders of the defendant Loan Association.

And paragraph 8 of the same decree (Record page 94) says:

"And for the further protection of the rights of the said intervenors and the said stockholders in the Loan Association, who never exchanged their stock therein for stock in the Trust Company, the Court adjudges and determines * * * " etc.

Then follows a list of those who constituted all of the stockholders of record in the defendant Loan Association at the time of the entry of the decree of February 27, 1913, and yet the learned respondent says that it appears of record that all of the stockholders of the defendant Loan Association were not similarly treated in the decree of February 27, 1913.

It appears from the affirmative statement of the proposed intervenors that they only claim the right to be stockholders in the Loan Association after they have secured permission of the court to rescind the transaction whereby they voluntarily surrendered their status as Loan Association stockholders and became stockholders in the defendant Trust Company.

Thus it appears in paragraph 2 of the petition of Waring et al. to intervene (Record page 115):

"That all of your petitioners, except John Wagner, have been stockholders in the Arizona Trust Company since about the 1st day of May, 1912, and that your petitioner, John Wagner, has been a stockholder in the Arizona Mutual Savings and Loan Association since about the 1st day of April, 1911."

Likewise the "Fourth," "Fifth" and "Sixth" prayers of the petition of the proposed intervenors, praying for

the recision of their status as stockholders of the Arizona Trust Company and a restoration to their former status as stockholders of the Arizona Mutual Savings and Loan Association, show clearly the nature of their claims (p. 20). Evidently such claims depend for their recognition by a Court of Equity upon their being asserted by diligent and not by procrastinating claimants. The creditors of the Trust Company, for instance the Farmers and Merchants Bank of Phoenix mentioned at page 9 of our first brief, might well at this late date object to these claims being given effect. No court has passed upon the validity of these claims.. It is obviously, therefore, indefensible to call these former stockholders "stockholders" of the Loan Association.

While it is true that John Wagner, mentioned above, moved the vacation of the decree of February 27, 1913, it is obvious that he does so as the result of an inadvertence. He not only moves the vacation of the decree, but moves to intervene in the cause notwithstanding the fact that he is already a party to the cause and is expressly named as one of the recipients of its benefits.

His name appears at page 96 of the record, folio 288.

He makes no offer to surrender the lien of One hundred and twenty-four and 59-100 ($124.59) Dollars which was awarded to him in the decree, or the dividend he received thereunder and, as we have said, his presence in the petition is evidently the result of an in-

advertence due to the large number of intervenors who sought to intervene in the cause.

It is obvious that those who voluntarily surrendered their status as Loan Association stockholders and became and for a period of one or more years remained stockholders in the Trust Company, by virtue of an exchange of their stock in the Loan Association for stock in the Trust Company, cannot by any possibility be still regarded as Loan Association stockholders. If they may be so regarded then the court could never enter a decree final as to such persons as might thereafter at any time see fit to come in and complain of the decree and assert rights as stockholders of the Loan Association, because originally and years prior thereto they had in reality been stockholders of record in the Loan Association.

It is admitted by the Return, as indeed it must be, that a large number of these proposed intervenors had already been parties to the record in the cause, but that by their voluntary act with full knowledge of all the facts alleged in the original bill and in the petition in intervention filed in their behalf, and which made them parties to the record, they had deliberately retired from the litigation and had refused to participate in it further, choosing as they had the right to do to remain as preferred stockholders of the Trust Company (Record pages 9-10).

Surely these litigants cannot, after the entry of a final decree in equity and after its partial execution, be accorded the extraordinary benefaction of the vacation and annulment of that decree without any attempt whatever on their part to excuse their obvious and flagrant delay in the reassertion of their rights.

Nor is the position of the other litigants who seek to intervene materially better than the class to which we have just referred. It must be remembered that the wrongful acts on which all these litigants base their claims were committed between April, 1911, and July, 1912 (Record pp. 4, 115), when the original bill was filed. These other litigants assert in their petition, verified July 15, 1913 (Record page 116):

> "That your petitioners had no notice of the appointment of said receivers nor any knowledge whatsoever of said appointments; that your petitioners were unaware that said companies were in the hands of a receiver and insolvent until some time in the month of February, 1913.."

This is a positive and distinct admission on the record that all of the proposed intervenors did have actual knowledge and notice of the pendency of the proceeding in the Court below at least as early as February, 1913.

Why then, if they wished to protect their alleged rights, did they wait until the expiration of the term at which that decree was granted before seeking redress in the court below?

Why after the expiration of the term at which that decree was granted, but before the time to review it by appropriate appellate procedure had expired, did these proposed intervenors seek relief from the court below which the court was without jurisdiction to give them, instead of making application to the defendant Trust Company to prosecute an appeal from the said decree of February 27, 1913, and upon the refusal of said Trust Company to prosecute such an appeal, why did they not prosecute it themselves, if they were in reality prejudiced by it?

The elimination of the fundamental error of fact in the case, namely, that there were stockholders of the Loan Association other than those specified in the final decree of February 27, 1913, makes the decision of this case a simple one.

The only hypothesis upon which the validity of the decree may properly be discussed is that the decree does take care of every Loan Association stockholder upon an equal basis.

But the respondent does not discuss the alleged invalidity of the decree upon this hypothesis at all.

Instead the major premise of his argument is that all the stockholders of the Loan Association were not named in the decree of February 27th, 1913, although the record clearly establishes the contrary to be the fact. Consequently our argument and that of the learned re-

spondent rest upon premises at irreconcilable variance with each other, and if logically pursued must lead to different results. That equity was done all of these stockholders, whether they were represented by counsel or not, affirmatively appears from the face of the decree itself.

The fund in possession of the Court's receiver was ample to pay all of the stockholders of record of the Loan Association the amounts which they had paid in to that institution, although entirely insufficient to pay to each stockholder the amount due in accordance with the contract between him and the Loan Association, which was abrogated by the insolvency of the company.

It is true, that a condition of insolvency, as that expression is understood in its application to building and loan associations, did exist.

The Loan Association was unable to meet its obligations as they accrued (Record page 92), and it is not disputed that the assets of the Loan Association in April, 1911, amounted approximately to the sum of $130,000 (Record pages 26-27) while it was alleged in the answer of the defendants (page 790) that in April, 1911, there was outstanding stock in the Loan Association of the attained book value aggregating approximately $130,000. Thus it appears that the insolvency of the Loan Association at that time consisted in its abandonment of the enterprise it was organized to pursue, and

in its inability to meet and pay its obligations to its stockholders; namely, to pay as it appears from the petition approximately one thousand ($1,000.00) dollars for every six hundred ($600.00) dollars paid in to the company, but it did not disclose the slightest inability to pay to the stockholders approximately what each had paid in, with ordinary interest thereon. It must be remembered that the insolvency of a building and loan association is as Judge Grosscup said in Towle vs. American etc. Society, 61 Fed. 446-447: sui generis.

> "The insolvency of a public building and loan association consists of its inability to perform the purposes for which it was created.
>
> *Lewis vs. Clark*, 129 *Fed.* 570, 574.

Consequently, when the cause came on for trial, had the Loan Association or the defendant Trust Company desired that a master be appointed for the purpose of ascertaining the extent to which the intervenors and other stockholders of record in the Loan Association were entitled to receive remuneration at the hands of the defendant Trust Company as the appropriator of all of the assets of the Loan Association, such a course could have been pursued, although the result of such proceeding would necessarily have been tedious and expensive and unsatisfactory both to the intervenors, the Loan Association stockholders and to the Trust Company.

Under such circumstances, the Trust Company was confronted with an inevitable decree requiring it to surrender all of the assets derived from the Loan Association which remained in its possession unliquidated. It meant in addition thereto that property acquired by the Trust Company after its appropriation of the assets of the Loan Association would likewise be subject to delivery to the Loan Association because of the admitted inability of the Trust Company properly to segregate such assets from the assets indisputably derived from the Loan Association.

It meant the immediate suspension and complete ruination of the Trust Company in which many innocent persons had been induced to become stockholders who had never been stockholders in the Loan Association.

It was to avoid such an unnecessarily drastic decree that as appears in the first sentence of the decree (Record page 89):

> "Counsel for the intervenors and counsel for the defendants were heard"

by the learned court in February, 1913, as to the final decree to be entered in that cause, and the decree which satisfied the claims of the intervenors and of each and all of the stockholders then of record of the Loan Association by giving to each a lien upon all the assets and properties of both companies for the amount that each

had paid in to these institutions, was suggested and the defendant Trust Company grasped at and accepted the benefits of that decree, which were obviously more beneficial to it and to its stockholders than a decree requiring complete restitution to the Loan Association.

There can be no doubt of the Court's power to award the liens which were decreed (Brief p. 8-9).

The defendant Trust Company not only accepted and received the benefits of this decree and, under the circumstances, was well satisfied with it, but it never prosecuted any appeal therefrom or in any way ever evidenced any dissatisfaction with the decree of February 27, 1913.

That decree, as to those named in it and as to the Trust Company, was in the nature of an enforced compromise which carried with it its benefits not only to the defendant Trust Company but to each and every one of the proposed intervenors who appear in exhibit 10 attached to the petition herein (Record page 113).

The case of Alexander vs. Southern Home Building & Loan Association, 110 Fed. 267, may be cited to show how freely courts enforce a compromise in winding up the affairs of insolvent Loan Association, usually so complicated. There the amount of a probable dividend was computed and allowed borrowing stockholders as a credit on their loans. Judge Pardee said at page 271:

> "It is not to be understood that the allowance of this anticipatory dividend is a matter of right or

even strict equity, but rather as a compromise to aid in the speedy collection of the assets."

These proposed intervenors, as we have pointed out in the petition, themselves accepted the benefits of this decree from the day of its entry in February, 1913, until July 15, 1913, just three days after the Farmers' and Merchants' Bank of Phoenix recovered a judgment against the Trust Company of Eighteen thousand five hundred ($18,500.00) dollars (Record page 13).

It is, of course, obvious that upon the entry of that judgment the preferred stockholders in the defendant Trust Company could no longer reasonably hope to receive any substantial part of the assets of the defendant Trust Company, which then consisted only of the surplus remaining after the payment of the liens created by the decree of February 27, 1913. They had not at that time found any means by which they, as preferred stockholders in an insolvent institution, could obtain priority in the distribution of their insolvent company's estate in preference to the claims of an ordinary judgment crditor.

After the entry of this judgment these proposed intervenors sought the annulment of the decree of February 27th, 1913, to the end that they might not only share in the distribution of the Loan Association assets as stockholders therein, after securing judicial permission to rescind their exchange of stock, but might by so doing obtain the priority to which we have referred over and

above the judgment creditor of the defendant Trust Company to the extent of eighteen thousand, five hundred ($18,500.00) dollars.

The argument of these intervenors is in substance, that the decree of February 27, 1913, is void, unjust and inequitable, but if the court will admit us to its benefits it will thereupon be valid, just and equitable. Such an argument does not commend itself to us as sound or reasonable. It does not appear that the proposed intervenors are the only Trust Company stockholders who were once Loan Association stockholders. If they are not interventions of this character might continue indefinitely and the estate could never be settled.

Another fundamental error which permeates the discussion of this controversy on the part of our learned adversaries is that the transaction between the Loan Association and the Trust Company was void from its inception, and that its total and absolute invalidity was adjudged by the decree of February 27, 1913.

It is doubtless true that at the commencement of this cause counsel for the complainant and intervenors asserted the claim that the transaction complained of was absolutely void; but it is also true that such an assertion cannot operate as an estoppel either against the counsel who made such a claim or his clients. The court, by which the question was adjudicated, did not so decide.

Circuit Judge Morrow expressed the opinion, as we

recall it, that the transaction was only voidable. This is indicated clearly by the first order he made in the cause granting the motion for a receiver, unless within a time prescribed the defendant companies filed a bond to indemnify the then interveners against loss by reason of the transfer of assets of the Loan Association to the Trust Company.

So, District Judge Sloan was of the opinion that the transaction was in reality not void *ab initio*, but that it was merely voidable and the decree itself in paragraph fourth (Record page 93) so adjudged. It declared:

> "That as to the interveners herein and other non-consenting stockholders in the defendant Loan Association, who had never transferred their stock therein for stock in the defendant Trust Company, the said proposed transfer of the assets and properties of the defendant Loan Association to the Trust Company was unlawful and invalid and not binding upon the interveners herein or upon the other outstanding and non-exchanging stockholders in the defendant Loan Association."

This is a long way from an adjudication that the transaction in and of itself was void, even as to those who had knowledge of it and consented to it, and who for a long period of time acquiesced in it and accepted the benefits of the transaction. It has been the uniform practice of the courts in all jurisdictions in dealing with minority stockholders' suits to lean towards the holding that a transaction, however invalid, is voidable rather

than absolutely void. The consequences of holding transactions such as are disclosed in the case at bar to be absolutely void instead of merely voidable are far too serious to permit such holdings to be made. An adjudication that such transactions are absolutely void results in unsettling property rights and in defeating the equities which innocent persons frequently acquire in properties transferred from one to another not in strict accordance with the rules of law.

Such a doctrine defeats the salutary application of the defenses of laches, waiver and estoppel to facts such as are presented by the record when in common justice and good conscience as these expressions are understood in a court of equity and not in their popular or emotional sense, such defenses should be applied to situations similar to that disclosed in the case at bar. The refusal to hold such transactions to be voidable rather than wholly void would permit persons with full knowledge of the perpetration of a fraud upon them to accept the benefits of the fraud, to acquiesce in and condone the transaction by which their rights were changed and after they were no longer in a position to return the benefits they had received, would permit them to come in and repudiate the transaction upon the ground that it was wholly void and not merely voidable.

So, we accept as an undoubtedly correct exposition of the law of the case the decision of Circuit Judge Morrow and District Judge Sloan, that the transaction is in

reality only voidable as to those who in due season complained of it and took active means to correct the wrong which as to them had been done.

Moreover, in their arguments on this point our learned adversaries have overlooked an important consideration. They argue that the whole transaction was void *ab initio* and confuse references to the wrong done the Loan Association by the transfer of its assets with the wrong done them as individuals in inducing them by alleged fraud to exchange their stock of the Loan Association for Trust Company stock. No argument is needed to show that the latter transaction is the basis of the alleged rights of these proposed interveners and was merely voidable at the instance of the parties alleged to have been wronged, provided they acted diligently in seeking recision.

While we respectfully submit that most of the discussion which follows is wholly inappropriate to the matter before the court, nevertheless, we feel it our duty to respond to the points suggested by the learned respondent in his second opinion in support of the decree of March 12, 1914, and while protesting that these suggestions raise no question whatever of jurisdiction in the court below, as constituted in March, 1914, to nullify the decree of February 27, 1913, long after the expiration of the term at which that decree was entered, nevertheless, we approach the discussion of those suggestions

for the purpose of showing that there is no merit in any of them.

(1) Reference is made by the learned respondent to the fact that shortly after the institution of the suit the complainant in the cause directed its dismissal, but that because some ten days prior to the filing of the direction to dismiss, John Dennett, Jr., and some of the other interveners named in the decree had duly filed their petition in intervention, adopting the allegations of the original bill, the court declined to dismiss the cause.

This matter was fully discussed before and passed upon by Circuit Judge Morrow and that learned judge held, in accordance with the authorities upon the subject, that since the diversity of citizenship and the requisite amount alleged indisputably existed and since it appeared that the court unquestionably had full jurisdiction of the subject matter involved, and that both defendants were before the court both by voluntary appearance and as the result of service of process upon them, the federal jurisdiction of the court was then intact. Thereafter and before the complainant's direction to dismiss was filed, the interveners filed their petition in intervention in the nature of an auxiliary bill in the court below and thereupon their rights in the subject matter were presented for adjudication, and no act of the complainant could thereafter destroy those rights.

The authorities uniformly hold that an auxiliary suit,

such as was instituted by the petition in intervention, may be maintained notwithstanding the fact that the court would not have had jurisdiction of such a suit as an original bill.

Rice vs. Dunbar Watter Co., 91 Fed. 433; Loy vs. Alston, 172 Fed. 90-94; Brown vs. Morgan, 163 Fed. 395, 396; Watson vs. Natl. Life & Trust Co., 162 Fed. 7, 10; Nat'l. Bank vs. Allen, 90 Fed. 545, 555; Huff vs. Bidwell, 151 Fed. 363, 384, and particularly the case of the Belmont Nail Co. vs. Columbia Iron & Steel Co., 46 Fed. 336, where the identical situation presented in the case at bar was passed upon, were all called to the attention of the learned court. In the latter case it appeared that an original bill had been filed in the court below and shortly thereafter a petition in intervention had also been filed by persons accepting the invitation of the representative plaintiff to join in and support the suit of the plaintiff.

Thereafter a settlement was effected between the defendant and the complainant in the cause and, as in this case, the defendant sought to defeat the existence of federal jurisdiction by virtue of that settlement. But the court refused to permit any such result to follow and it was held, as Circuit Judge Morrow held in this case, that the court's jurisdiction was still intact and that it was the duty of the court to adjudicate the rights of the litigants presented to it by the petitioners in intervention.

Consequently, there is nothing in the comment upon the complainant's direction to dismiss the litigation.

(2) It is said by the learned respondent that if the court in entering the decree of February 27, 1913, did not transcend the powers conferred upon it by law and did not exceed its jurisdiction, then the court below has no authority or jurisdiction after the term at which that decree was rendered to vacate, modify or amend that decree. On the other hand, it is said that all courts have the power to vacate at any time their own judgments rendered without or in excess of jurisdiction, and the learned court cites in support of this assertion 180 Fed. 950, and cases therein cited.

This case in 180 Fed. 950 is a familiar one.

It is the case of Politz vs. Wabash Railroad Co.

It is the very case which resulted in the successful application for a writ of mandamus in the Supreme Court of the United States in the matter of the Metropolitan Trust Co., 218 U. S. 321, directed to the learned Circuit Judge who rendered the opinion relied upon.

In rendering the opinion of the Supreme Court in the Metropolitan Trust Co. case, Mr. Justice Hughes announced the converse of the proposition asserted by the learned respondent in its application to the facts before the Court:

"Nor could the court," said Mr. Justice Hughes,

"exercise the general power which it possesses to modify or set aside its orders or decrees prior to the expiration of the term at which the final decree is entered: for in this case that term had ended before the motion was made."

The decision relied upon by the learned respondent was unanimously reversed by the decision of the Supreme Court of the United States in the Metropolitan Trust Co. case, and obviously no benefit to the learned respondent can be derived from a decision which has been held by our highest tribunal to be unsound.

So, likewise, in support of the learned respondent's contention that the decree of February 27, 1913, was rendered without jurisdiction, is cited the case of the Standard Oil Co. vs. Missouri, 224 U. S. 280, Windsor vs. McVeigh, 93 U. S. 274, Reynolds vs. Stockton, 140 U. S. 265.

These authorities are supposed to support the assertion that the decree of February 27, 1913, is void because beyond the issues raised by the pleadings in that the court had no power to award a lien to a litigant who prayed for complete restitution of the property upon which the lien was awarded.

We have already pointed out that the decree was not beyond the issues raised in the pleadings.

The portions of the pleadings to which this court has directed attention show that the decree is amply supported by the pleadings.

Moreover, as we have shown, the absence of a specific prayer for the relief granted is of no consequence whatever.

The facts alleged and proved justified the relief awarded. The relief awarded was not inconsistent with the relief specifically prayed for.

> Jones vs. Missouri Edison Electric Co., 144 Fed. 765, 768.

The granting of a lien on all the properties when the complainant might have had complete restitution so far as possible was clearly within the power of the court.

> Erie R. R. Co. vs. Dial, 140 Fed. 689, 691.
> Smith vs. Township, 150 Fed. 257, 261.
> Lockhart vs. Leeds, 195 U. S. 427.

And even if this were not so, the relief granted was properly grantable upon the facts alleged and proved under the prayer for general relief.

> Beiling vs. Am. Tobacco Co., 72 N. J. Eq. 32, 44.
> Backus vs. Brooks, 195 Fed. 452, 454.
>
> Walden vs. Bodly, 14 Pet. 156, 164.
>
> Underground Electric R. R. Co. vs. Omsley, 169 Fed. 671.

See also cases cited on page 16 of petitioners' brief. It is said there is no pleading to support the decree and hence that it is void, but the Supreme Court in the case of the Standard Oil Co. vs. Missouri, 224 U. S. 280, so much relied upon by the learned respondent, expressly

took occasion to point out that the existence or non-existence of a prayer for specific relief had no effect upon the validity of a decree and this is thoroughly established by the decisions to which we have respectfully directed attention in our brief in support of our application for the order to show cause.

Indeed, the impression seems to obtain with the learned respondent that the pleading is the matter of vital consequence. We respectfully submit that it is the proof which is of vital consequence, and if the court below found proof as it did to support the decree which it rendered, it is clear that the pleadings before it were a proper and suitable conveyance for that proof which precludes the possibility that the resulting decree can be void for the reasons stated.

The evidence adduced before the court in February, 1913, is not and cannot be brought before this court in this proceeding. Can this court assume on a collateral inquiry contrary to the well settled rules of presumptions that the court below did not have evidence before it which justified its decree when that court decided otherwise after a full trial? We think this court will indulge in no such rash and unsound presumption.

It is claimed by the learned respondent that there is no allegation in the bill that restitution would be impossible or work hardship to innocent stockholders.

There are allegations in the bill which clearly indi-

cate the existence of equities in favor of persons not parties to the suit which attached to the property acquired by the Trust Company after its transactions with the Loan Association and which were not derived from any of the Loan Association properties.

Moreover, the decree expressly adjudicated the impossibility of a complete restitution at the time it was rendered and that part of the decree was expressly supported by the pleadings. (Record 33-34, 93.) Notwithstanding this positive and express adjudication by the learned court as constituted in February, 1913, which adjudication was made after a full trial upon the evidence, the learned court as constituted in March, 1914, without any evidence before it, directed that the impossible be performed and that a complete restitution of property, which had already been reduced to cash and the proceeds dissipated, should be made to the Loan Association.

We do not dispute the correctness of the decisions cited by respondent which indicate that if the court, as constituted in February, 1913, had undertaken in the supposed exercise of its equitable jurisdiction, to send some of the officers of the defendant companies to the penitentiary the decree to that extent, however just, would clearly show an excess of authority which would render that portion of the decree void.

Nor do we dispute the lack of power in a Federal

court, while engaged in the trial of an action on a promissory note, to admit wills to probate.

These are extreme illustrations which have no application to the case at bar.

In the first opinion written by the learned respondent and filed as part of the decree of March 12, 1914, it was announced (Record page 125) that to constitute jurisdiction four essentials must exist.

In the second opinion filed by the learned respondent in September, 1914, one of the alleged essentials is missing and instead Mr. Justice Brewer's language in Reynolds vs. Stockton, to the effect that there are only three essentials, is quoted and relied upon.

The fourth alleged essential erected by the learned respondent in his first opinion was that the Court must have proceeded according to the established modes (of procedure) governing the class to which the case belongs.

This impression was evidently obtained from a reading of the opinion in Windsor vs. McVeigh, 93 U. S. 274, an action in ejectment where the Court made use of this expression in its application to a confiscation proceeding in which the usual mode of procedure had been so far departed from as to strike out the appearance of a protesting defendant and to drive him from the Court below without the hearing which he actively sought in

response to the process which had been issued against him.

The Supreme Court certainly did not mean to announce that a decree rendered by a competent court of equity, with the parties and subject matter before it, would be open to collateral attack because the trial court had departed from the usual modes of procedure in not appointing a master to do the work which the court did for itself, or in some other non-jurisdictional respect.

No new fundamental requisite of jurisdiction was engrafted upon our equitable jurisprudence either by the passing comment of the Supreme Court in the ejectment suit of Windsor vs. McVeigh or by its erroneous application to the case at bar by the learned respondent.

We think these elementary expressions concerning the essentials of jurisdiction are well and tersely summarized by the statement of Mr. Justice Lurton in Hine vs. Morse, 218 U. S. 493, 505, where it is said:

> "If then jurisdiction consists in the power to hear and determine as has so many times been said and the court errs in holding that a case has been made either under its inherent power or its statutory authority, can it be said that it has usurped jurisdiction and that its decrees are absolute nullities?" The court answered this inquiry in the negative.

In Voorhees vs. Bank, 10 Pet. 449, 474, the court says:

"The line which separates error in judgment from usurpation of power is very definite and is precisely that which denotes the cases where a judgment or decree is reversible only by appellate court, or may be declared a nullity collaterally when it is offered in evidence in an action concerning the matter adjudicated or purporting to have been so. In the one case it is a record meriting absolute verity; in the other mere waste paper; there can be no middle character assigned to judicial proceedings which are irreversible for error. Such is their effect between the parties to the suit, and such are the immunities which the law affords to a plaintiff who has obtained an erroneous judgment or execution."

This expression was quoted with approval by the court in Hine vs. Morse, *supra*.

Will any one assert that if the decree of February 27, 1913, had been offered in evidence in some controversy wholly unrelated to the cause in which it had been rendered, that any court could properly have regarded it as mere waste paper or as a nullity? Obviously not. Even the contention of the respondent is not quite so sweeping in effect.

The Supreme Court says there is no middle course. It is either nothing or it is what it purports to be and as such entitled to absolute verity.

Clearly the court had power to hear and determine the controversy before it in February, 1913. In the last analysis, the contention of the learned respondent is simply that a different and more drastic decree should

have been rendered. In other words, the respondent would have decided differently had the case been before him for decision in February, 1913. This we concede. But the power to hear the cause and determine it is not disputable. Suppose the Court did err in some respect, whence did the respondent derive the authority which he assumed to exercise to sit in review upon the acts of his learned predecessor, and to revise those acts for ordinary alleged error while the decree stood irreversible for that cause either by the respondent or even in this learned court because of the lapse of time?

How can it be disputed that the court had before it in February, 1913, a justiciable controversy which it was its duty and within its power to decide?

How can it be denied that this power to hear and determine included the right to decide upon and to find the facts which limit the extent of the court's authority and that such decision is the subject of review only in an appellate court and not the subject of revision after the term by another judge holding the same court.

We are, of course, well aware that no court can confer jurisdiction upon itself by deciding that it has jurisdiction when by law it has not. But having admitted jurisdiction to grant a complete restitution of property, if such relief had been physically attainable, does the court lose jurisdiction to grant less than a complete restitution because it cannot grant all the relief prayed for?

The court had jurisdiction to find the facts. It found facts which in its judgment justified the relief granted. Those facts were within and supported by the pleadings. Is it of the slightest legal consequence that the learned respondent entertains a different opinion as to the relief which his learned predecessor should have granted?

We confidently approach the discussion of the authorities cited by the learned respondent in support of his contention.

An inspection of these authorities will disclose their utter inapplicability to the case at bar.

In the case of the Standard Oil Co. vs. Missouri, 224 U. S. 280, the court had before it on a writ of error directed to the Supreme Court of Missouri a judgment of ouster and fine which had been rendered in original quo warranto proceedings in the Supreme Court of Missouri.

The decision involved an inquiry into the power of the Supreme Court of Missouri to impose a fine in quo warranto proceedings, although those proceedings had been instituted solely for the purpose of ouster and had not prayed the imposition of any fine upon the respondent.

The Supreme Court of the United States affirmed the judgment and while it is true in the course of the opinion it gave expression to the views quoted by the

learned respondent, yet it is clear from a reading of the opinion that the statements there made are entirely inapplicable to the case at bar, while many other expressions contained therein indicate the clear and absolute finality of the decree of February 27, 1913, and its immunity from assault by the learned court below.

So, in Windsor vs. McVeigh, 93 U. S. 274, it appeared that the plaintiff in the court below had brought ejectment to recover certain land in the city of Alexandria, in the state of Virginia. The plaintiff proved title in himself and the defendant relied upon a deed to his grantor from the United States Marshal in proceedings which had been had for the confiscation of the plaintiff's property.

It appeared that in the year 1863 the premises were seized by the Marshal of the district and a libel of information against the property filed in the name of the United States upon the ground that the plaintiff was the owner of the property, but that due to his affiliation with the Confederate Government and his participation in the rebellion that his property was rendered liable to seizure and confiscation at the instance of the United States. The owner appeared in response to the process which issued against him but his appearance was stricken out by the court below and he was denied a hearing and under the resulting decree a sale of the property was had which the defendant in the ejectment suit asserted as his muniment of title. To review

a judgment in favor of the plaintiff a writ of error was issued from the Supreme Court of the United States and thereupon the judgment was affirmed.

The question considered was whether the decree in condemnation was of any validity, it appearing that the defendant therein had appeared and had sought a hearing, but that his appearance was stricken from the files and he was affirmatively denied the right to a hearing in the court below.

Can it be said that such a case has the remotest application to the case at bar?

As we have already pointed out in this case, all parties were before the court and were in reality heard in the rendition of the decree of February 27, 1913.

All of the stockholders of the Loan Association were represented before the Court pursuant to the authority conferred by rule 37 of the Supreme Court Rules and by the authorities which authorize those having a community of interest in litigation of this character not only to represent such non-appearing persons who are already quasi parties to the record, but to bind such non-appearing parties by the resultant decree. It is a certainty that both the Loan Association and the defendant Trust Company were before the court at the trial of this case. It is equally certain that the rights of every one of the proposed interveners who were by their own admission stockholders in the Trust Company, were fully

represented by that Trust Company in the court below, and the decree shows that in reality the decree was more beneficial to the defendant Trust Company, and consequently to those who were still its stockholders, than any decree which either the defendant Trust Company, its stockholders or its judgment creditors had a right to exact.

An examination of the case of Reynolds vs. Stockton, 140 U. S. 254, shows that it contains nothing adverse to the petitioners. In that case the plaintiffs had sued a certain absent defendant and the Superintendent of Insurance of New York to recover a portion of a fund of one hundred thousand ($100,000) dollars in possession of the Superintendent of Insurance. The proceeding resulted in a judgment or decree against the defendants other than the Superintendent of Insurance, at least one of whom was not served with process, who never actually appeared in the proceeding and took no part whatever in the trial, which judgment was for more than one million ($1,000,000) dollars. We do not think the quotations made from that case by our learned opponents are fair. We think they only tend to mislead until the case is examined. The omission from the quotations made by our learned opponents of the portions of the opinion which expressly refer to a different rule, either where substantial amendments are made to the complaint *or where it appears that the defendant actually took part in the litigation of the matters determined, is most significant.*

At page 266 the Court in this case said:

> "Nor are we concerned with the question as to the rule which obtains in a case in which, while the matter determined was not, in fact, put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial and actually litigated that matter. In such a case the proposition so often affirmed, that that is to be considered as done which ought to have been done, may have weight, and the amendment which ought to have been made to conform the pleadings to the evidence may be treated as having been made. Here there was no appearance after the filing of the answer and no participation in the trial or other proceedings. Whatever may be the rule where substantial amendments to the complaint are permitted and made, and the defendant responds thereto, or where it appears that he takes actual part in the litigation of the matters determined, the rule is universal that where he appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is conclusive only so far as it determines matters which by the pleadings are put in issue."

We think the distinction between the case cited and the case at bar is self-evident. In the case at bar there was no failure to secure the personal attendance of both defendants. Both were actually present at the trial contesting all of the issues presented and litigated, and each defendant had its remedy in the event that the court rendered a decree beyond the pleadings in the cause to seek redress by appropriate appellate procedure. It is, of course, obvious that the proposed interveners

named in Exhibit 10 could not properly have been made parties to the cause at the instance of the complainant. A bill joining such persons as parties would have been clearly bad for an improper joinder of parties because at least until such persons evidenced their claim to a recision of their status as Trust Company stockholders their rights were purely derivative from the Trust Company, and consequently fully protected by that Company's resistance of the decree.

Let these persons now complain that they had no "hearing" and were not before the court.

It is plain that they were before the court and did have a full hearing which effectually demonstrates the inapplicability of the cases relied upon by the respondent.

An inspection of the authorities cited and relied upon by the learned respondent and his counsel shows that much of the language quoted from the opinions of the courts, which tends to indicate that the scope and exercise of a court's authority is always open for review, were in reality announced by courts exercising appellate jurisdiction over the decrees complained of and the cases are inapplicable to the cases at bar.

(3) It is useless to discuss at length the character of the controversy presented by the suit in the court below.

It was a minority stockholder's suit instituted by the complainant in a representative capacity to redress

wrongs which had been sustained by the corporation in which he was a stockholder. It is equally plain that the avails of such litigation belonged to the company in the interest of which such litigation was brought and maintained. But may we inquire to whom the avails of this litigation should have been delivered? Should they have been delivered to the delinquent officers of the insolvent Loan Association who were charged with a misappropriation of its assets and with breaches of trust which rendered them wholly unfit to continue to occupy their positions as fiduciaries for the complainant and the other stockholders? Does the learned respondent forget that one of the purposes of the bill was to wind up and dissolve in effect the business of the defendant Loan Association? Is it forgotten that a temporary receiver of the defendant Loan Association had been duly appointed and that the final decree of February 27, 1913, appointed a permanent receiver for the purpose of receiving the assets and funds belonging to the defendant Loan Association? The avails of the litigation were delivered into the possession of the receiver of the Loan Association to be distributed by him to those whom the court adjudged and determined were lawfully entitled to them.

Obviously, the receiver received them in the right of the corporation of which he was appointed receiver. Obviously, he had but one duty to perform with reference to their disposition. It was his duty to obey the mandate contained in the decree of the court, not his duty to speculate whether the court had rendered justice

or injustice, not to determine for himself whether some other decree would not have been preferable.

(4) It is true that the rights of the interveners and stockholders of the Loan Association named in the decree of February 27, 1913, included the right to participate in a distribution of all the assets of the defendant Loan Association upon the distribution of those assets to it upon a complete winding up of its affairs. It is equally true that a court of equity, having before it both of the companies involved in this transaction, as well as each and all of the stockholders in the defendant Loan Association, was not so bound and circumscribed by form and rule not supported by reason, that it could not reach an equitable adjustment of the varied and complicated equities presented to the learned court, not alone by the pleadings but by the proof adduced before it.

All of the stockholders of the Loan Association were willing to forego their pound of flesh by trying to enforce payment of their exact distributive share in the assets of their insolvent company. They were content to accept a lien upon the assets of their company for the amount which they had paid in to that sinking concern. They were willing to waive any interest upon their payments which constituted years of saving; they were willing to waive the fulfillment of the glittering promises contained in their contract with the Loan Association, and in consideration of such waiver receive what they had actually paid in to the unsuccessful enterprise.

The Loan Association was a mere legal shell composed only of the interveners and its stockholders named in the decree of February 27, 1913. All of its other former members had abandoned the enterprise and had cast their lot with the defendant Trust Company. The Loan Association had no creditors and no one existed who either could or did object to the terms of the decree of February 27, 1913.

Is it not significant that no stockholder has attempted to intervene, asserting himself to have been a stockholder of the Loan Association when the decree of February 27, 1913, was entered and that he did not receive the benefits of that decree? Instead, every stockholder of the Loan Association has accepted the benefits of the decree and no such person complains of it.

The defendant Trust Company was greatly benefited by the decree of February 27, 1913. It made no complaint of the decree and, as we have stated, the only complainants are the ordinary preferred stockholders of the defendant Trust Company who seek to avoid the consequences of their company's debt of eighteen thousand, five hundred ($18,500) dollars by an attempt to reinstate themselves as stockholders in the defunct Loan Association long after the rights of all such stockholders have been finally heard and determined.

(5) The learned respondent propounds the following inquiry in his second opinion:

"It is alleged that at the time of the said transfer the Trust Company was insolvent and paid nothing of value for the assets of the Loan Association, and that the whole transaction was a fraudulent scheme: then why vest the title in the Trust Company?"

The reason for vesting the title in the Trust Company is obvious. The court had adjudged the interveners and all the stockholders of the Loan Association to be entitled to a lien upon the assets of the Company and the surplus was to be delivered to the Trust Company. The theory was that the rights of the Loan Association stockholders having thus been amply protected, no one else remained who did or could complain of the transaction between the Loan Association and the Trust Company.

In other words, while as to the complaining interveners and the stockholders of the Loan Association the transaction was invalid, yet as to other persons the transaction was not illegal and when the interveners and the Loan Association stockholders were given a lien upon the property their safety and protection required that the validity of the title to the property to which their lien attached should likewise be adjudicated to the end that their lien might have unquestioned and indisputable validity.

The impossibility of complete restitution for which the complainant and interveners originally prayed, was another reason why the alternative relief was accorded to

the interveners and stockholders of the Loan Association and why this relief was just and equitable. Further, because this method of disposing of the equities presented did justice to the interveners and stockholders of the Loan Association and did not with unnecessary severity destroy the then going concern conducted by the defendant Trust Company. Nor did it destroy needlessly the rights of its innocent stockholders who had never had any connection with the defendant Loan Association. And finally, because the remedy accorded the interveners and the stockholders by the award of a lien upon the properties, as to which these same persons prayed a complete restitution, was in reality not at all inconsistent with the specific prayer contained in the original bill.

As we have indicated the decree was not dissimilar to a decree nisi, or to one which bears internal evidence of an enforced compromise between the parties to the litigation. As Circuit Judge Sanborn said in Jones vs. Mo. Edison Electric Co., 144 Fed. 765, 778:

> "Nor is the suggestion, that the complainant may not recover the value of his stock in this suit in equity because such a recovery would be inconsistent with his repudiation of the contract of consolidation, and because he has not prayed for it, very material. The first prayer of the bill is for the restoration of its property to the Edison Company and this is in effect for a restoration to the complainant of his share of it. Now as the court may under this prayer rehabilitate the Edison Company, it may do less. It may

grant a decree nisi, a decree that all its properties, powers and franchises be restored to the Edison Company, unless within a certain time the defendant pay to the complainant and those who join him the value of their share of the property transferred to the consolidated company. Such a decree would be consistent with the repudiation of the contract of consolidation and with the first prayer in the bill."

The learned respondent concludes his inquiry as follows:

"The effect of this transfer was to subject all the assets of the Loan Association, remaining after the payment of the interveners' preferred lien, to the obligation of the insolvent Trust Company, thus leaving the shares of stock of the remaining stockholders valueless."

Of course, the assets of the defendant Trust Company ordinarily would be and should be subject to the obligations due from the Trust Company to its lawful creditors in preference to the claims of ordinary preferred stockholders in the Trust Company. We cannot find anything extraordinary in this aspect of the decree. In fact, we respectfully suggest that one of the most extraordinary features of the decree of March 12, 1914, is that it in effect subordinates the claims of the lawful creditors of the Trust Company to those of its preferred stockholders.

(6) Again the learned respondent says:

"If it be admitted that in this class of cases the avails of the litigation belong to the corporation de-

> frauded and not to the complaining stockholders, then it seems to me that the learned judge *erred* in entering the decree of February 27, 1913."

The argument is then made that the record shows that those named in the decree of February 27, 1913, are not the only stockholders of the Loan Association, which statement has already been completely refuted, and the learned respondent concludes that there is no law which authorizes the court to charge the entire property of the Loan Association with a lien and trust in favor of a part only of such stockholders, and leave the losses and expenses of litigation to be borne by the remaining stockholders.

A sufficient answer to this assertion is that nothing of the sort was done.

(7) It is asserted that the decree is conflicting in its provisions, particularly in adjudging a fee of over three thousand ($3,000) dollars to the attorney for the interveners, in that it is said the court must have found that he rendered services which entitled him to a claim against the corporation itself, and was a proper charge against the avails of the litigation which he had conducted, for it is said the decree directs that this fee shall be paid out of the funds belonging to the corporation in the hands of the receiver.

> "If," continues the respondent, "the services were not rendered for the corporation and if the avails of the litigation which he conducted did not inure

to its benefit, then the court was not authorized to pay him out of the funds which belonged to the corporation. Such compensation should have come from the interveners or from funds which belonged to them alone. One provision of the decree limits the liens granted by it to the interveners named therein, while another provision gives the attorney for the same interveners a substantial fee out of funds to which they had no interest and which did not diminish the amounts to be received by them."

We are at a loss to understand why this argument is made. Surely, the learned respondent cannot successfully maintain that if an error were committed by the court as constituted in February, 1913, with reference to the award of an allowance to counsel, that such an award would render the decree of February 27th subject to annulment.

The award of this allowance has never been made the subject of review before any court. Indeed, it was based upon an express finding of fact made by the court which granted it (Record 97), that it appeared to the court's satisfaction that

"Counsel for the interveners herein has rendered substantial services of value to all of the interveners and to all of the stockholders of the defendant Loan Association named in the preceding paragraph, and that said services have resulted in the production of a fund in court consisting of the assets of the said defendant Loan Association and of the assets of the said defendant Trust Company for the benefit of the said interveners named herein, and for the benefit of

> the stockholders of the defendant Loan Association named in the preceding paragraph, and the cause being one of extraordinary and exceptional difficulty, and the court being fully advised by proof of the value of the services rendered"

in accordance with the usual practice of the court in such cases the court made allowances not only to counsel for the interveners but also to the receiver of the Loan Association and to his counsel.

The award to counsel for the interveners was in the following language:

> "To the interveners above named upon account of the services rendered to them in this proceeding by their counsel, William M. Seabury, $3,376.06."

Before continuing this argument we desire to point out the misstatement of fact which inadvertently appears in the comment of the learned respondent in which he says:

> "One provision of the decree limits the liens granted by it to the interveners named therein. * *"

A mere inspection of the decree (Record page 95) shows that it is not so limited, but includes all of the stockholders of the Loan Association.

The allowance which was made to the interveners' counsel was made by the court not only after the presentation of proof, but after a careful review of the authorities applicable to the situation. The proof amply

justified the award inasmuch as it appears of record in this case that solely as the result of the services rendered by counsel for the interveners a fund had been produced in court of the approximate value of seventy-thousand ($70,000) dollars (Record pages 17, 97-98) and that this fund had been wrested from the hands of the corrupt officers of the defendant companies who were engaged in its depletion.

The decisions which were called to the attention of the court as constituted in February, 1913, and were subsequently called to the attention of the learned respondent, were ample authority for the making of the allowance. The authorities to which we refer are the following:

Lamar vs. Hall & Wimberly, 129 Fed. 79, 82.

Barber vs. Southern Building & Loan Association, 181 Fed. 638.

Ely vs. Van Kamel Revolving Door Co., 184 Fed. 459.

Burroughs vs. Toxaway Co., 185 Fed. 435, 441.

Miers vs. Columbia, etc., Association, 166 Fed. 781.

Guaranty Trust Co. vs. Chicago R. R., 185 Fed. 441.

Trustees vs. Greenough, 168 U. S. 505, 527.

Central Railway vs. Pettus, 113 U. S. 116.

It is certainly clear that this allowance is not prop-

erly the subject of revision in this learned court in this proceeding. The decree of March 12, 1914, contained no allusion to the subject of counsel fees, nor is it possible to tell from an inspection of the decree of March 12, 1914, whether the portion of the decree of February 27, 1913, which awarded counsel fees was intended to be revised and corrected by the learned respondent, and if so, to what extent. If the real purpose of the annulment of the decree is the recovery of this counsel fee why not say so?

We are wholly unable to understand or appreciate the argument of the learned respondent upon this subject. The theory upon which compensation is awarded to attorneys for complainants in litigation of this character is well known and clearly understood by this court. The cases which we have cited clearly disclose that such allowances are made upon the theory of compensation or partial compensation to those who employ the attorney whose services result in the production of a fund beneficial to those persons and to the persons chargeable with the obligation to pay for the services which have resulted in benefit to them. The award is made in the nature of costs for the successful conduct of litigation of the kind specified. It is absurd to suggest that the lien of the interveners and of the stockholders of the Loan Association who receive the ultimate benefit of the services rendered should be diminished to the extent of the allowance made, when it appears in this case that

the fund produced was amply sufficient to discharge the liens created by the decree in full, as well as to pay the ordinary legitimate costs and expenses of administration.

The rights of the interveners and of the Loan Association stockholders were and are contingently charged with the cost of administration. The decree expressly provides (Record page 99) that the receiver shall sell the whole or such part of the assets

> "as may be necessary, first to pay and discharge the allowances heretofore made as the cost of administration of the insolvent estate of the defendant Loan Association, and thereafter to discharge and pay the costs and expenses incident to the administration of the estate of the said defendant Trust Company * * * * and that thereafter he pay pro rata in equal shares to each and all of the interveners herein and to the stockholders of the defendant Loan Association named in the preceding 8th paragraph such sums of money as may be received by such permanent receiver until the said interveners and the said non-exchanging Loan Association stockholders named in the preceding 8th paragraph are paid in full the amounts set opposite their respective names herein."

Consequently, if the estate under the management of the receiver should so diminish as not to be sufficient to pay in full the liens created by the decree of February 27, 1913, in that event all of the interveners and all of the stockholders of the Loan Association who derived the benefit of the services of the complainant's counsel would have their liens diminished to the extent of all

the costs of administering the estate of the insolvent Loan Association. If, on the other hand, the estate was sufficient to pay the claims of the interveners in full, as well as the claims of the Loan Association stockholders, it was in accordance with the usual course of procedure in such cases to direct that the unsuccessful party who was entitled to the surplus remaining after the payment of the claims involved in the litigation should, of course, pay the legitimate costs and expenses of administration.

It may be sought to elicit from this learned court some expression of opinion adverse to the allowance which the court made to counsel, although we respectfully submit that the record before this court conclusively demonstrates that such allowance was reasonable for the amount and value of the services rendered, and that it was a proper exercise of discretion by the learned court below as constituted in February, 1913, amply supported by the authorities and in strict accord with the usual mode and practice of procedure in such cases.

(8) It is argued that because it appears in the decree of February 27, 1913, that the persons therein named were deceived and induced to effect an exchange of their Loan Association stock for stock in the Trust Company by misrepresentations made to them by the defendants, some of which misrepresentations were contained in printed literature of the companies, it must necessarily follow that all other persons who exchanged

their stock in the Loan Association for stock in the Trust Company were similarly deceived. This argument is plainly without merit.

Of course, such a result does not necessarily, or even probably follow, and if it did, it would amount to nothing. This record is replete with conclusive evidences against the proposed interveners, that even if they were deceived they acquiesced in the fraud perpetrated on them after full knowledge of its perpetration, and in many instances took affirmative steps to procure the ratification of the transactions had between these two companies by withdrawing from the litigation below in which they originally embarked and by accepting the benefits of the decree of February 27, 1913, as preferred stockholders in the defendant Trust Company until long after the expiration of the term at which the decree in question was entered.

It occurs to us that a perfect case of laches, waiver and estoppel is made against those at whose instance the learned respondent undertook to nullify the decree of February 27, 1913, and it becomes wholly immaterial to inquire whether these persons were or were not deceived by representations similar or dissimilar to those upon which the interveners named in the decree of February 27th, 1913, relied to their detriment, and of which these latter persons took occasion to complain and have rescinded by a court of competent jurisdiction before it was too late so to do.

(9) Counsel for respondent say in substance that a distribution of the assets collected cannot be made on any other basis than that the original complainant and interveners should prorate in the assets so collected, that to permit any stockholder suing in a representative capacity "to be paid in full the book value of his stock as has been done in the decree of February 27, 1913, would be to disregard the fact that they were stockholders in the insolvent Loan Association and take from the pocket of those for whose benefit this stockholders' suit was instituted a sum of money sufficient to pay in full those stockholders who were his representatives in the bringing of the suit."

This assertion involves several misconceptions. The decree expressly provides that in the event the funds are insufficient to pay the Loan Association stockholders the full amount of their liens the receiver shall prorate the payments accordingly (Record 99, folio 297). But no Loan Association stockholder was paid in full the book value of his stock as inadvertently stated by counsel. The book value means the value of the stock as determined by the books under and pursuant to the terms of the contract; in this case approximately one thousand ($1,000) dollars for every six hundred ($600) dollars paid in.

The decree in this case directed the return to the stockholders of the amounts actually paid in without in-

terest, which sums were to be prorated if the funds were insufficient to pay the amounts specified.

We are unable to see anything inequitable or unconscionable in such decree.

It was an equal method of distribution and a just one.

It did not differentiate between matured and unmatured stock.

There is ample authority to the effect that upon the insolvency of a Building and Loan Association those whose stock had matured are not entitled to a preference and priority over and above those whose stock had not matured.

Towle vs. American Bldg. & L. A., 75 Fed. 938.

Coltrane vs. Baltimore Bldg. & L. A., 110 Fed. 281, aff'd 113 Fed. 785.

Alexander vs. Southern Home Bldg. & L. A., 110 Fed. 267.

Solomons vs. American Bldg. & L. A., 116 Fed. 676, aff'd 120 Fed. 1018.

The authorities indicate that upon the insolvency of a Building and Loan Association the contract between the association and its members is abrogated and that nothing remains but the distribution of the assets of the association in accordance with equity and good conscience.

If the insolvency of the association abrogates the

contract, as it clearly does, what more just or equitable distribution could be made than to require the Loan Association to restore its stockholders as nearly as possible to their original status? And is not this done by a decree which directs that the moneys actually paid in to the insolvent institution shall be returned to those who paid it, in this instance even without interest, leaving the Trust Company as the successor in interest of the Loan Association to deal with others who had acquired substantial interests in its properties as justice might require?

(10) Nor is there the slightest occasion for the alarm and anxiety expressed by our learned opponents that because no master was appointed, it is impossible to determine which, if any, of the persons named in the decree, were borrowers of the Loan Association. The creation of a lien in favor of the persons named did not discharge any pre-existing debt due from the lienors to the company.

We assume that the receiver would perform his duty in this respect and either collect or offset the debt of the lienor against the lien before the lien is paid in accordance with the terms of the decree of February 27, 1913.

(11) We deem it unnecessary to discuss at length the assertion that the decree is void because it is one at law or because the bill is now said to be multifarious.

A decree in equity does not become a judgment at

law because the decree contains a provision for the payment of money and we are not aware that even if a bill is multifarious that the question of its multifariousness may be presented after it was raised and adversely disposed of on demurrer and after the entry of a final decree on the merits, or if it could be so raised that by any possibility the question could be regarded as one of jurisdiction.

We have endeavored to respond to every point suggested by our opponents and believe we have done so.

While the learned respondent and his able counsel felicitate themselves upon their desire to approach and consider the merits of the controversy without argument upon technicalities, this is ingenuous but harmless sophistry, since the decree has been subjected to the same searching scrutiny which it would be accorded were it here for review upon appeal and its revision is sought upon every technicality which the ingenuity of our learned opponents could suggest, even including the claim that the court is without jurisdiction because the original bill is said to be multifarious.

It renders no assistance to this court to have the learned respondent say in substance that this proceeding is clearly not within the court's jurisdiction, but nevertheless the respondent submits to the court and requests that it decide the matters alleged to be improperly before it.

We have not known this learned court to engage in academic discussions beyond the scope of its jurisdiction even at the request of a District Court for enlightenment upon matters which it is the duty of that court to determine for itself.

> "* * * * the judicial power of the United States must not be exerted in a case to which it does not extend even if both parties desire to have it exerted."
>
> Dred Scott case, 19 Howard 393, 567.

And this is clearly applicable to the exertion of a general as distinguished from an exclusive federal jurisdiction.

But we respectfully submit that the questions relating to the jurisdiction of this court to grant the relief prayed for are entirely clarified and the right made manifest by the views expressed by it upon the rendition of the order to show cause, and having determined the existence of jurisdiction to grant the alternative writ upon the showing made, that writ should be made absolute, since the return discloses no grounds for the denial of the remedy now so clearly shown to be within the jurisdiction of this Court and a matter of such vital necessity to the petitioners.

This learned court refrained from expressing any opinion as to whether the decree of February 27, 1913, was final and whether it was still in the breast of the

court in March, 1914, when it was nullified by the respondent.

Upon the first subject we respectfully contend that as to all parties the decree of February 27, 1913, possessed every attribute of finality and that it is a final decree in every sense of the word.

> Simpkins, A Federal Equity Suit, 2d Edition, p. 607, and cases there cited.

Upon the other question, whether the decree of February, 1913, was still within the breast of the court in March, 1914, we say that this is a mixed question of fact and law.

The return avers no fact which shows that there was any reservation of any kind which prevented the expiration of the term from operating to terminate the power of the court over the decree of February, 1913. Indeed, it clearly appears from the record that nothing was reserved by the court which could lawfully have resulted in leaving the decree of February, 1913, in the breast of the court after the expiration of the term at which it was granted.

It follows as a matter of law that the expiration of the term placed that decree beyond the power of the court, and that the instrument of March 12, 1914, by which the learned respondent assumed to nullify it, is a mere nullity.

We conclude that the decree of February 27, 1913, was not and is not void.

Consequently, the decree of March 12, 1914, which assumed to nullify it, is itself a nullity and the remedy invoked in this case being appropriate and necessary to redress the extraordinary situation disclosed by this record, we respectfully submit that the relief prayed for should be granted.

Respectfully submitted,

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San Francisco, October
13th, 1914.